No. 87-5840

In The
Supreme Court of the United States
October Term, 1987

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JOSEPH F. SPANIOL, JR.
CLERK

EDWARD McNAMARA,

Appellant,

v

COUNTY OF SAN DIEGO
DEPARTMENT OF SOCIAL SERVICES,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT, DIVISION ONE

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

I

IS IT A DENIAL OF EQUAL PROTECTION TO TERMINATE THE PARENTAL RIGHTS OF AN UNWED FATHER WHO PROMPTLY MANIFESTED A SIGNIFICANT PARENTAL INTEREST IN HIS CHILD AND WOULD BE A GOOD PARENT SOLELY BECAUSE IT IS IN THE BEST INTERESTS OF THE CHILD?

II

IS IT A DENIAL OF EQUAL PROTECTION TO TERMINATE THE PARENTAL RIGHTS OF AN UNWED FATHER WITHOUT A FINDING ADVERSE TO HIS PARENTING ABILITY WHEN (A) OTHER FATHERS MUST BE FOUND TO HAVE NO INTEREST IN OR ABILITY FOR PARENTING BEFORE THEY LOSE THEIR RIGHTS, AND (B) UNWED MOTHERS DO NOT LOSE THEIR RIGHTS UNDER SIMILAR CONDITIONS?

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OPINIONS BELOW

The opinion of the California Court of Appeal, Fourth Appellate District, Division One, which appears in the separate Appendix submitted herewith, p. 1a, was reported at 191 Cal.App.3d 786, but was ordered not to be published in the Official Reports by the California Supreme Court, p. 69a.

The opinion of the California Supreme Court, which applied as law of the case, appears in the Appendix, p. 36a, held that the "best interests of the child" test applied, and was constitutionally sound, and remanded the case for further proceedings. It was reported at 37 Cal.3d 65, as *In re Baby Girl M.*

GROUNDS FOR JURISDICTION

1

THE JUDGMENT APPEALED

Edward McNamara appeals from the final judgment of the Court of Appeal of the State of California, dated April 30, 1987, p. 1a. The judgment terminated all of his parental rights as to a child born out of wedlock, but as to which he had proved paternity and sought to raise as his own soon after birth, within the statutory time for seeking custody.

The California Supreme Court had previously ruled in the case, as law of the case, and the Court of Appeal declined to reconsider, that California's custody test of "best interests" of the child controlled paternity suit

claims by father's seeking to retain their parental rights. That test is that a parent is entitled to custody unless custody with the parent would be detrimental to the child. The court also ruled that the best interests/detriment to the child test is the constitutional equivalent of proving unfitness of the unwed father to have parental rights.

No appeal was filed previously because the judgment terminating parental rights was not final; it was subject to the unwed father, appellant, proving he was the best person to have custody so he could retain his rights.

A timely petition for review was denied July 30, 1987, and this appeal is being docketed within 90 days of that denial.

STATUTORY BASIS FOR JURISDICTION

Jurisdiction for appeal is based on 28 U.S.C. § 1257(2).

The California Supreme Court and Court of Appeal ruled that California Civil Code, section 7017, subdivision (d), as applied, was not repugnant to the United States Constitution, Amendment XIV, as it did not deny appellant equal protection of the laws or due process of law.

Appeal jurisdiction lies where the state court has actually decided that a state statute as applied is not repugnant to the United States Constitution. *Charleston Fed. S. & L. Assn. v. Alderson,* 324 U.S. 182, 185-186 (1945); *Edwards v. Elliott,* 21 Wall. (88 U.S.) 532, 550-551 (1874); accord, *Allenberg Cotton Co. v. Pittman,* 419 U.S. 18, 22 (1974); *Poulos v. New Hampshire,* 345 U.S. 395, 403 (1953).

Alternatively, the court should treat the papers as a petition for a writ of certiorari pursuant to 28 U.S.C. § 2103, and grant the writ. (Rules 17.1 (b) (c); cf., *Kulko v. Superior Court,* 436 U.S. 84, 90, n. 4 (1978).

o

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourteenth Amendment, United States Constitution: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The pertinent California statutes are in the Civil Code. Section 4600, Appendix, p. 70a, covers child custody in general and sections 7004, p. 70a, 7006, p. 71a, and 7017, p. 72a, are part of the Uniform Parentage Act.

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STATEMENT OF THE CASE

Edward's daughter, Katie, was born July 18, 1981. He and the mother had dated during the fall of 1980, but did not see each other after November. Edward did not know of the pregnancy nor of Katie's birth until after August 1, 1981. The mother told him after Katie had been placed in a foster home. The mother wanted Katie adopted by strangers, and she wanted Edward not to have any contact with his daughter.

Not knowing that Katie was to be relinquished for adoption, Edward explored possible placements. At first, because he had two sons with him, he suggested his daugh-

ter be placed with his friends. On August 10th, he learned the mother was giving Katie up for adoption. Fearful he would never see her again, he asked for custody.

The statute allowed him 30 days to seek custody and assert parentage [Cal. Civil Code, § 7017, subd. (d), p. 72a] He acted well within that time and promptly under the circumstances.

At the initial hearing in December of 1981, the trial court found that Edward was the biological father and a "good parent [who] can provide a good, loving home for the child." But the court found that the best interests of the child would be served by giving custody to the prospective adoptive parents who had cared for her a total of five months. It was felt she had "bonded" with them and could not form a relationship with her father.

The California Supreme Court reversed, holding that unwed fathers, who are not presumed fathers, Cal. Civil Code, § 7004, sub. (a), p. 70a, are entitled to the parental preference presumption, Cal. Civil Code, § 4600, p. 70a. Custody may not be awarded to a nonparent unless custody with a parent would be detrimental to the child. [p. 39a-42a] The court, however, remanded the case for further proceedings to determine if the passage of time had changed circumstances so that Edward was no longer entitled to custody. [p. 50a]

Further hearing was held in February of 1985. No evidence showed Edward other than a good and loving parent who can provide a good home. [p. 6a] All parental rights were terminated, however, because Katie had been with the prospective adoptive parents for over four years and removing her would be detrimental. The Court

of Appeal affirmed, finding that there was substantial evidence to support the finding of detriment to the child, the only issue left open by the California Supreme Court. [pp. 6a-7a]

At all times, Edward has been a good and loving father who has manifested significant parental interest.

Edward sought custody shortly after learning of Katie' birth. He has been found to be a good parent.

At the first hearing, there was no evidence even of detriment to the child if removed from the foster parents after five months. [p. 49a] The trial court found he was a good parent who could provide a loving home. [p. 37a]

That evidence did not change at the second hearing. [p. 6a] Indeed, the trial court encouraged the adoptive parents to make Edward part of Katie's life. [p. 5a] There is no way to enforce visitation after termination of parental rights, of course, and visitation pending appeal was denied. There has been no contact since shortly after birth.

Edward is not an unfit parent and promptly acted to assert his parental rights and assume his parental duties. Katie's birth.

California applied a best interest test to terminate parental rights of an unwed father.

Under California Civil Code, section 7017, subdivision (d), p. 72a, as applied by the California courts, the test for terminating parental rights of unwed fathers who are not presumed fathers, Cal. Civil Code, § 7004, p. 70a, is what is in the best interests of the child. [p. 39a]

That is the result. There is a parental preference which must be overcome by a showing it would be detrimental to the child to give custody to the parent. [pp. 48a-49a] The statute has been amended so that there no longer is even that parental preference for fathers not presumed fathers. It now is a straight best interest test. [p. 13a, n. 7] If custody with someone else would be better for the child, the father loses, as Edward did.

The courts rationalized this by saying that the U. S. Supreme Court has never ruled on the issue, having reserved the question. [pp. 45a-48a] "The Supreme Court has not directly considered a fact situation similar to ours, where a mother has relinquished a newborn child and refused the father any contact. Thus the court has not addressed whether the natural father's parental rights may be terminated by only a best interests standard, or if a further finding of detriment is required." [p. 47a]

The court refused to hold that a finding of unfitness is required or even that the same standards apply to Edward as apply to other fathers, presumed fathers, which includes every one the mother lets have contact. Cal. Civil Code, § 7004, p. 70a. Other parents must be found to have abandoned the child or otherwise demonstrate an inability or lack of interest in their child. Cf., Cal. Civil Code, § 232. The unwed mother's consent to adoption is always required. Cal. Civil Code, § 7017, subd. (d), p. 72a.

There is a significant difference, too, between loss of custody and termination of parental rights. Custody may be modified and visitation allowed. Cf., Cal. Civil Code, § 4600. [p. 70a] Even if the foster parents got custody because of the delays in the courts, Edward might get the visitation the trial court thought he should have and encouraged it. Possibly, he could get custody; if not now, later.

At least he would have a relationship—and still could—during childhood and beyond.

Now those sweet and memorable moments, those irreplaceable moments, that companionship, are gone forever.

A parent deprived of parental rights also loses substantial legal rights: the right to earnings during minority, the right to inherit, and the right to be supported in old age, if necessary.

The losses are significant and based solely on the best interest test.

The California Supreme Court ruled that a finding of detriment and best interests is the constitutional equivalent of a finding of unfitness; at least it will be until this Court directs otherwise. [p. 47a] That, of course, is logically absurd. One describes the father and the other factors beyond his control, having nothing to do with the father.

After remand, the Court of Appeal believed the constitutional issue was foreclosed by the California Supreme Court [p. 6a, n. 2-7a], and the California Supreme Court denied review. [p. 68a]

REASONS QUESTIONS PRESENTED ARE SUBSTANTIAL

I. PARENTAL RIGHTS ARE SUBSTANTIAL AND CONSTITUTIONALLY PROTECTED

The right to parent one's children has been vindicated in a long line of cases. It is a fundamental right. *Prince*

v. Massachusetts, 321 U.S. 158, 166 (1944). The rights of natural parents have also been vindicated, even though the child is born out of wedlock. *Lehr v. Robertson,* 463 U.S. 248, 257-258 (1983); *Stanley v. Illinois,* 405 U.S. 645 (1972).

II. THE ISSUE OF TERMINATING PARENTAL RIGHTS SOLELY IN THE BEST INTERESTS OF THE CHILD HAS BEEN RAISED AND RESERVED BY THIS COURT

As the California Supreme Court observed [p. 45a, n. 8], in *Caban v. Mohammed,* 441 U.S. 380, 394, n. 11 (1979), this Court noted that a newborn child was not involved. The same case also reserved whether a State is "barred from ordering adoption in the absence of a determination that the parent whose rights are being terminated is unfit." Id., at 394, n. 16.

In *Santosky v. Kramer,* 455 U.S. 745, 760, n. 10 (1982) however, this Court doubted that a parental right termination based on the best interests of the child could stand:

> "The Family Court Judge in the present case expressly refused to terminate petitioner's rights on a 'non-statutory, no-fault basis.' App. 22-29. Nor is it clear that the State constitutionally could terminate a parent's rights *without* showing parental unfitness. See Quilloin v. Walcott, 434 U.S. 246, 255, 54 L Ed 2d 511, 98 S Ct 549 (1978) . . . "

Other state courts addressing the issue have held unconstitutional statutes permitting terminations without a showing of unfitness, abandonment, or substantial neglect. *In re J. P.,* 648 P.2d 1364, 1375[9] (Utah 1982); *In re Adoption of Baby Boy C.,* 644 P.2d 150 (Wash.App. 1982). Those are California's statutes—old and new versions—and they are invalid.

The question is squarely presented.

III. A CAPABLE PARENT WHO MANIFESTS SUBSTANTIAL PARENTAL INTEREST IS ENTITLED TO RETAIN HIS PARENTAL RIGHTS

Edward acted promptly and did everything he could to retain his parental rights and get custody—he still is. The courts agree that he should have been given custody at the original hearing, five months after Katie's birth. [pp. 2a, 12a, 18a, 24a, 34a, 49a] It may not be appropriate to give him custody now, immediately, but that is no reason to end parental rights or forbid contact.

> "When an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he 'act[s] as a father toward his children.' "
>
> *Lehr v. Robertson, supra,* 463 U.S., at 261.

In *Stanley v. Illinois,* 405 U.S. 645, 657 (1972) and *Santosky v. Kramer,* 455 U.S. 745, 760, n. 10 (1982), this Court held that unwed fathers are entitled to a hearing to determine if they are capable parents who have manifested a significant parental interest.

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relation-

ship and make uniquely valuable contributions to the child's development."

Lehr v. Robertson, supra, 463 U.S., at 262.

At the least, to terminate rights, there ought to be a finding there was no significant relationship *and* that the father was not prevented from forming such a relationship. See, White, J., dissenting, *Lehr v. Robertson, supra,* 463 U.S., at 271, n. 3.

Edward was prevented from any relationship by the mother and the state agency, the adoption department. He proved he is a capable parents and showed significant interest by seeking custody—total responsibility. Still, he lost *all* parental rights. His parental opportunity was denied despite carrying all his burdens of proof.

The issue is squarely raised.

CONCLUSION

Reserved and significant issues are squarely presented. The California Supreme Court refused to address them until this Court does so expressly, but the statute was held valid. The new statute is even more directly a "best interests" test. Probable jurisdiction should be noted.

Respectfully submitted,

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Counsel for Appellant

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CERTIFIED FOR PUBLICATION

COURT OF APPEAL

FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re BABY GIRL M., a Minor COUNTY OF SAN DIEGO, etc.,	)	
Petitioner and Respondent,	)	D003076
v.	)	(Super. Ct. No. A24905)
EDWARD M.,	)	
Respondent and Appellant.	)	(Filed April 30, 1987)

APPEAL from a judgment of the Superior Court of San Diego County, Judith McConnell, Judge. Affirmed.

Joseph D'Addario for Respondent and Appellant.

Lloyd M. Harmon, Jr., County Counsel, Daniel J. Wallace and Arlene Prater, Deputy County Counsel for Petitioner and Respondent.

Lee W. Selvig for Amicus Curiae.

Edward M. appeals from a judgment terminating his parental rights with respect to his five-year-old daughter, Katie. This is our second view of the case. Since our last exposure, it has been the subject of a divided decision by the state Supreme Court and reevaluated by the trial court under a new legal standard. In addition, recent legislation has endeavored to overrule the effect of the Supreme Court decision.

The emotionally charged issue which lies at the heart of this case thus is not presented to use in a pristine fashion. Katie, Edward and the prospective adoptive parents who have cared for Katie since she was five weeks old appear as pawns caught in a web of changing legal standards and an excruciatingly slow appellate process. The question before us is whether Edward, concededly fit to care for Katie, can nonetheless be denied the opportunity to develop parental ties and obtain custody because of the detriment Katie would suffer if she were removed from the custody of the prospective adoptive parents. Any resolution of this issue would in some sense be unfair. It is only because of the operative legal standards focus on the *child's* welfare that we can affirm the trial court judgment terminating Edward's parental rights.

FACTUAL AND PROCEDURAL BACKGROUND

Edward's relationship with Katie's mother ended in November 1980 when neither party knew of the pregnancy. Soon after Katie's birth on July 18, 1981, the mother requested and received adoption assistance and placed Katie in a foster home. The mother never told Edward she was pregnant, and he first learned of the birth on August 1, 1981. He contacted the county Department of Social Services and met with a social worker on August 5. Although he did not request custody, Edward asked that Katie be placed with the family then provided day care for his sons. Later that day, the mother rejected Edward's placement request and formally relinquished Katie for adoption, explaining that she wished the child placed with a family unknown to either her or Edward.

The petition to terminate Edward's parental rights pursuant to Civil Code section 7017[1] was filed August 10, 1981. On that date Edward again met with the social worker and discovered the mother had relinquished Katie for adoption. He expressed fear he would be unable to see his child and arranged to visit her. The visit took place August 17, and Edward then specifically requested custody. Despite his wishes, Katie was placed in the "pre-adoptive" home of Pamela and Robert Moses on August 24, 1981, where she has remained to this date.

At the December 1981 hearing on the section 7017 petition, the trial court found that Edward was "a good parent [who] can provide a good, loving home for this child." Nonetheless, applying the "best interests of the child" test, the court concluded Edward's parental rights should be terminated so that Katie could remain with the prospective adoptive parents. There was no finding by the court that it would be detrimental to Katie if custody were awarded to Edward. The case was appealed, and on October 22, 1984, the California Supreme Court reversed and remanded, holding section 4600 applies to all termination of parentage proceedings under section 7017, subdivision (d). (See *In re Baby Girl M.* (1984) 37 Cal.3d 65.) Consequently the trial court was required to find both "that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child." (§ 4600, subd. (c).)

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[1]All statutory references are to the Civil Code unless otherwise specified. When referring to statutory subparts, we omit repetition of the word "subdivision."

In its opinion the Supreme Court concluded:

"We have held the trial court erred by applying the best-interests-of-the-child standard without first determining whether granting custody to the natural father would be detrimental. A review of the evidence introduced at the hearing indicates a finding of detriment would have been unsupportable *at that time*. However, concerned, as we must be, with the child's welfare and because of the passage of time, we recognize further evidence will be necessary.[12]" (37 Cal.3d at pp. 75-76.)

Footnote 12 then provides as follows: "We recognize the dilemma arising under the present fact situation. The state has placed the child with prospective adoptive parents pending resolution of Edward's claims; *strong relationships have developed, and breaking those bonds could be harmful to the child.*" (*Ibid.*, emphasis added.)

The trial court defined its duty upon remand and ruled in relevant part:

"My job as I understand it, is to determine whether an award of custody of this child to her parent, the father, [Edward M.], would be detrimental to her.

"And the evidence that I have before me consists of, first of all, the testimony and report of Dr. Nelson, who is an experienced, board-certified child psychiatrist, familiar with problems that children encounter when they suffer separation.

"And his opinion was that removal of Katie from the only home that she's ever known would cause extreme psychological and emotional harm to her.

"He found her to be a bright, happy, well-adjusted child, who would suffer profoundly if she were removed from the Moses home.

"Furthermore, it is likely, in his opinion, that she would become depressed and sensitized to future loss, and vulnerable to mental illness later in life.

"Dr. Nelson further stated that even with a slow removal from the Moses home, the child would suffer less harm ostensibly, but the trauma would still be great, and she would still suffer detriment as great as with a sudden removal. It would just be prolonged over a longer period of time.

"The other evidence I have on the subject of detriment is the evidence of Dr. Lamson. Frankly, her testimony carries less weight, both because of her lesser qualifications vis-a-vis Dr. Nelson, but also because of her lack of familiarity with the participants.

"But I would like to note a couple of things from her testimony. She testified that there would certainly be trauma to Katie— and I think those are her exact words—to be removed from the Moses home; and there could be permanent detriment.

"She also said the trauma would be great here because the child would lose the two parents that she has known virtually since birth, and they could be replaced by a man who is a stranger to her.

"In other words, she did not disagree with the testimony given by Dr. Nelson.

"I find the evidence is clear and convincing and, in fact, uncontradicted that Katie would suffer extreme emotional and psychological harm should she be removed from the Moses home, and this harm constitutes detriment within the meaning of Civil Code 4600.

"I find that it would be in the best interest of the child that custody be awarded to Mr. and Mrs. Moses, who are in almost every sense the true parents of this child.

"They've indicated that they will include [Edward M.] in Katie's extended family, and I encourage them to do so.

"The petition under 7017 is granted."

As of the February 1985 hearing after remand from the Supreme Court, the Moseses were in a very good marital relationship between a competent, willing and intelligent woman and a successful, energetic man, both of whom demonstrated concern with caring for each other and their children, a six-year-old adopted son and three and one-half year old Katie. No question is raised as to their suitability as parents.

No evidence presented at the February 1985 hearing detracts from the original finding that Edward is a good parent who can provide a good, loving home for Katie. Edward's personal circumstances have changed in terms of his no longer having full-time custody of his two sons by a former marriage and his living arrangements. The sons are in Northern California in the custody of their mother who has remarried. He lives with his parents in a three-bedroom condominium and is a licensed contractor steadily employed as a cost estimator for a general contractor.

DISCUSSION

The issue presented to us is whether the trial court's finding of detriment can be sustained where there is no evidence of Edward's inability to care for Katie and the finding is based solely on the psychological harm to Katie which would result if she were removed from the Moses home. Concededly, the record firmly supports the trial court's factual determination as to the existence of such harm,[2] hardly surprising in view of the consistent con-

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[2]Although I agree with many of the concerns expressed in Justice Work's thoughtful concurring opinion, it appears to me

(Continued on following page)

clusions reached by child development and psychology professionals regarding the extent of personality and value structure development achieved by children during the first five years of life. (See e.g., The Comprehensive Textbook of Psychiatry (Kaplan & Sadock, eds.) (4th ed. 1985) ch. 39.1, p. 1722; Developmental Psychology Today (1971) ch. 13, p. 225, 236.) The sole legal question for use to resolve is whether the court's finding of detriment can be sustained in the absence of some additional evidence of Edward's inability as a father. Resolution of this question requires our examination of the Supreme Court's earlier opinion in this case as well as its later decision in *Michael U. v. Jamie B., supra,* 39 Cal.3d 787.

When it remanded this case to the trial court, the Supreme Court expressly contemplated that the trial judge would consider whether three and one-half year old Katie would suffer psychological harm as a result of being taken away from the only parents she has ever known.[3] Foot-

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(Continued from previous page)

that consideration of the constitutional issue is necessarily foreclosed by the Supreme Court's *Baby Girl M.* opinion. That court's extensive citation to the Buchanan article (see Buchanan, *The Constitutional Rights of Unwed Fathers After Lehr v. Robertson* (1984) 45 Ohio St. L.J. 313) and federal precedent makes clear that it was aware of and considered the federal constitutional issue. The Supreme Court would not have remanded the case to the trial court for application of the detriment standard based on later-developing facts (see 37 Cal.3d at pp. 75-76) if consideration of those facts was constitutionally inappropriate because they were the product of state action in violation of Edward's fundamental parental rights. In my view, our position in the judicial hierarchy (see *Auto Equity Sales, Inc. v Superior Court* (1962) 57 Cal.2d 450, 455) precludes consideration of Edward's constitutional argument.

[3]Now, more than two years later, the harm to Katie would if anything be greater were she to be separated from the Moses.

note 12, (quoted *ante*, p. 5) indicates that additional evidence would be necessary on this issue. Moreover, nothing in the Supreme Court's opinion suggests that the psychological harm identified in footnote 12 would be insufficient in itself to sustain a finding of detriment on remand.

Edward argues that "detriment" under section 4600 requires some negative evidence regarding the father, evidence which is admittedly lacking in this case. He relies in part on *Michael U. v. Jamie B., supra,* 39 Cal.3d 787, in which a spintered Supreme Court attempted to apply its *Baby Girl M.* decision.

Michael U. involved the parental rights of a 16-year-old father who had sought custody of his son, Eric, after the 12-year-old mother had placed Eric for adoption. Of the five justices concurring in the judgment, Justices Mosk, Lucas and Kaus—two of them were dissenters in *Baby Girl M.*—restate their opposition to the "detriment" standard and preference for the "best interests of the child" test, which of course the test originally applied by the trial court in terminating Edward's parental rights in this case. (39 Cal.3d at pp. 796-797.)

Justice Broussard's lead opinion joined by Justice Grodin attempts to apply the *Baby Girl M.* "detriment" standard and concludes that the evidence before the trial court compelled a conclusion that placement with Michael would be detrimental to Eric. In reaching this conclusion, the lead opinion describes Michael's lack of maturity and judgment but also relies on the psychological harm Eric would suffer if her were separated from his prospective parents. (*Id.* at p. 795.) The opinion explains the basis for such reliance:

> "Judicial decisions have recognized the harm to a child which results when he is removed from a stable home environment. (See *Marriage of Carney* (1979) 24 Cal.3d 725, 730-731 [157 Cal.Rptr. 383, 598 P.2d 36, 3 A.L.R. 4th 1028] and cases there cited.) In *Adoption of Michelle T.* (1975) 44 Cal.App.3d 699 [177 Cal. Rptr. 856, 84 A.L.R. 3d 654], the court took judicial notice of the book Beyond the Best Interests of the Child by Goldstein, Freud & Solnit (1973), which 'emphasizes the importance to a child of continuity of parental relationships. According to the authors, changes or interruptions in this relationship cause the child to regress "along the whole line of his affections, skills, achievements, and social adaption." (*Id.*, at p. 18) "Physical, emotional, intellectual, social and moral growth does not happen without causing the child inevitable internal difficulties. The stability of all mental processes during the period of development needs to be offset by stability and uninterrupted support from external sources. Smooth growth is arrested or disrupted when upheavals and changes in the external world are added to the internal ones" (*id.*, at p. 32).' (P. 706.) The court concluded with a quotation from *Williams v. Neumann* (Ky.App. 1966) 405 S.W.2d 556, 557: '"[A child] cannot be suddenly transplanted like a dogwood tree without running serious and dangerous risk of frustration and bewilderment.'" " (Id. at p. 795, fn.7.)

It is true that under the facts of *Michael U.*, there was evidence both of Michael's inability to accept the responsibilities of parenting and of the psychological harm Eric would suffer if he were separated from the prospective adoptive parents. Given those facts, of course, there is every reason for the lead opinion to discuss *both* factors in resolving the case. One searches in vain, however, for any indication that negative evidence regarding the father

is a necessary predicate to a finding of detriment.[4] In fact, just the opposite conclusion is manifest in footnote 8, in which the opinion distinguishes "detriment" from the concept of "unfitness," a finding of which is necessary to remove a child from the custody of a parent. "It is presumably detrimental to a child to award custody to a parent who is so unfit that the state might have to intervene to retrieve custody, but it might also be detrimental to place him with a parent who is not unfit, depending upon the child's current circumstances and the available placement alternatives. (*In re Reyna* [(1976)] 55 Cal.App.3d [288,] 302-303.)" (39 Cal.3d at p. 796, fn 8.) Significantly, "the child's current circumstances and available placement alternatives" are precisely the factors relied on by the trial court here in refusing to award custody of Katie to Edward. In fact, those two factors could not conceivably *include* negative information about the father's parenting abilities. Thus, all five of the concurring justices in *Michael U.* clearly expressed their view that harm resulting from the separation of the child and the prospective adoptive parents *in and of itself* can constitute "detriment" sufficient to support the termination of parental rights under section 7017.

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[4]Moreover, the time period involved in this case makes the issue not merely different in degree but also different in kind. Eric was seven months old at the time of the initial hearing in *Michael U.* and had lived with his prospective adoptive parents since the age of two months. He was two and one-half years old when the Supreme Court filed its opinion. In contrast, Katie was three and one-half years old at the time of the trial court hearing under review here and has now passed her fifth birthday. To suggest it would not be "detrimental" to uproot a five-year-old from the only home she has ever known eviscerates the common meaning of the word.

This conclusion is further supported by Justice Broussard's citation to *In re Reyna* (1976) 55 Cal.App.3d 288 which, like the present case, involved a natural father attempting to obtain custody after the child had been placed with prospective adoptive parents. The child was just over one year old at the time of the Court of Appeal decision. Anticipating the Supreme Court's *Baby Girl M.* decision, the *Reyna* court held that section 4600 required the trial court to make a finding that placement of the child with the father "*would be detrimental to the child*" (55 Cal.App.3d at p. 296, emphasis in original). It then commented on the proper application of this standard:

> "[I]n furtherance of the legislative purpose of placing the best interests of the child ahead of a parent's rights, even though a father is found to be fit in the usual sense, he nonetheless will be denied custody if it is shown that it would be harmful to place the child with him. [Citation.] For example, if it is shown that it would be emotionally and psychologically harmful to uproot the child from the care and love of the nonparents with whom it has been living for a substantial period of time and place it with the father with whom it has never had contact, then custody must remain with the nonparents." (*Id.* at p. 302.)

In sum, the rule to be distilled from *Baby Girl M.* as interpreted by *Michael U.* is that the "detriment" standard of section 4600 precludes the trial court from merely comparing the father with the prospective adoptive parents and choosing the placement which the court believes is best. This standard has the salutary effect of avoiding placements perfunctorily based on "objective" criteria such as income or social status. But where there is demonstrable harm to the child if he or she is placed with the parent—regardless of whether such harm is attributable to

the parent's "fault"—that placement is "detrimental" within the meaning of section 4600 and an alternative placement with nonparents is appropriate.[5]

We have previously alluded to the difficulty of this case, due in large part to the fact that Edward appears to have done everything he reasonably could have to establish a parent-child relationship with Katie. He was frustrated by the existence of legal standards in a state of flux and a not-sufficiently sensitive bureaucracy. But while the rights of parents are important, our society is committed to the judgment that the interests of children predominate. The function of the judicial system in these matters is not to punish insensitive bureaucracies but to assess the effect of placement alternatives on children.[6]

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[5]The book *Beyond the Best Interests of the Child* has become a standard reference in this intractable area of the law. (See e.g., *Michael U. v. Jamie B.* (1985) 39 Cal.3d 787, 795, fn. 7; *In re Angelia P.* (1981) 28 Cal.3d 908, 917; *Adoption of Michelle T.* (1975) 44 Cal.3d 699, 706.) The authors distinguish between biological parents and "psychological parents" in the following terms:

> "[F]or the child, the physical realities of his conception and birth are not the direct cause of his emotional attachment. This attachment results from day-to-day attention to his needs for physical care, nourishment, comfort, affection, and stimulation. Only a parent who provides for these needs will build a psychological relationship to the child on the basis of the biological one and will become his 'psychological parent' in whose care the child can feel valued and 'wanted.' An absent biological parent will remain, or tend to become, a stranger." (Goldstein, Freud & Solnit, Beyond the Best Interests of the Child (1973) p. 17.)

[6]As the court stated in *In re Reyna, supra,* 55 Cal.App.3d at p. 304:

> "[David] argues that constitutionally he must be accorded the same rights as a married father and that, if he had been

(Continued on following page)

It is of some solace to us, although probably none to Edward, that this case is sui generis. That it has taken over five years to resolve is due principally to the fact that it served as the vehicle to clarify the governing legal standard. Moreover, the Legislature has responded to the Supreme Court's *Baby Girl M.* decision by amending section 7017.[7] By specifying the "best interests" test as the only

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> afforded a hearing promptly after the child's birth, he would have received custody because detriment to the child could not have been shown that early in the child's life. [¶] While it is most unfortunate for David that the agency acted in a precipitous manner without careful investigation as to his whereabouts, we cannot unwind the clock and simply award custody to David because of the agency's misjudgment 11 months ago. To do so would be to disregard the best interests of the child as mandated by section 4600."

[7]Subdivision (d)(2) of section 7017 now reads in relevant part:

> "If the natural father or a man representing himself to be the natural father claims parental rights, the court shall determine if he is the father. The court shall then determine if it is in the best interest of the child that the father retain his parental rights, or that an adoption of the child be allowed to proceed. The court, in making that determination, may consider all relevant evidence, including the efforts made by the father to obtain custody, the age and prior placement of the child, and the effects of a change of placement on the child. If the court finds that it is in the best interest of the child that the father should be allowed to retain his parental rights, it shall order that his consent is necessary for an adoption. If the court finds that the man claiming parental rights is not the father, or that if he is the father it is in the child's best interest that an adoption be allowed to proceed, it shall order that that person's consent is not required for an adoption; such a finding terminates all parental rights and responsibilities with respect to the child. Section 4600 does not apply to this proceeding. . . ."

applicable standard, this amendment effectively overrules *Baby Girl M.* The Legislature's specific direction for trial courts to consider "the age and prior placement of the child, and the effects of a change of placement . . ." confirm that the result reached by the trial court in this case is consistent with legislative intent. By adopting the interpretation of "detriment" as we do here, we minimize the disruption which can be occasioned by changing and uncertain legal standards.

DISPOSITION

Judgment affirmed. The County shall bear the costs of this appeal.

CERTIFIED FOR PUBLICATION.

/s/ WIENER, Acting P. J.

WORK, J., concurring:

Although I concur, I am disturbed by the extent of the governmental involvement in creating the unfortunate scenario which now directs this result. As I perceive the law, had the juvenile court recognized the fundamental rights of biological parents and children summarized below, it would now be unnecessary to attempt to interpret the majority holding in *In re Baby Girl M.* (1984) 37 Cal.3d 65, as to the meaning of "detriment".[1] However, the issue of state involvement was never raised by the parties and only recently addressed by way of supplemental briefing at our request. The extent of state involvement is a pivotal concern in any contested parental rights termination case involving a fit, capable and willing parent, and, except for the certainty of permanent emotional harm should Baby Girl M. (Katie) now be removed from the family of which she has been a member for six years, would mandate a different result.[2]

Most reported cases reviewing Civil Code[3] section 7017 proceedings, in which a natural father contests sever-

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[1]It is especially ironic that Edward's position was worsened by the California Supreme Court's taking the case and resolving an issue favorably to him. In effect, the majority holding in *Baby Girl M.* on the question of Civil Code section 4600 standards tracks the result we originally reached two and one-half years ago. Had this court's prior opinion remained undisturbed, Edward would have had a presumed father status long ago and the child undoubtedly would have adjusted satisfactorily.

[2]I do not agree with the conclusion in the lead opinion suggesting the remand from the Supreme Court should be interpreted as a holding on this constitutional issue. A plain reading of the Supreme Court's decision shows this issue was neither actually presented nor determined by the court. (See *People v. Shuey* (1975) 13 Cal.3d 835, 842.)

[3]All statutory references are to the Civil Code.

ing of his parental ties, are private litigations pitting those wishing to adopt against the father. Of significance, this was the case in *Michael U. v. Jamie B.* (1985) 39 Cal.3d 787. Thus, in those cases, the state involvement was at most minimal and indirect. In stark contrast here, it is San Diego County directly withholding custody from a capable biological father, while choreographing the tableaux to be viewed by the juvenile court in court proceedings in which it is the party opposing that father. It is the County which removed Baby Girl M. from temporary placement *after* her father requested custody. The County successfully relied on the bonding to the adoptive family, which it artificially created, to convince the juvenile court initially, and us now, that the emotional harm to Katie from being returned to her real father prevents us from doing so.[4] However, the unsatisfactory result in this case should be prevented in the future by strict adherence to constitutional principles recognizing a biological father's right to develop his parenting interest is paramount to the interests of all except the child's mother.

As a general proposition, a parental rights termination proceeding interferes with a natural parent's fundamental liberty interest. (*Santosky v. Kramer* (1982) 455 U.S. 745, 753-754; *Quilloin v. Walcott* (1978) 434 U.S. 246, 255.) Further, an unwed father has a constitutionally-protected, special, opportunity interest to *establish* a familial relationship with his child. (*Lehr v. Robertson* (1983) 463 U.S. 248, 262.)

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[4]I do not mean to suggest the County's continued litigation is legally improper. It is expressly permitted to be a party to these proceedings by section 7017.

While *Santosky* involved proceedings to sever ties of parents who had established a custodial family relationship, in *Quilloin* the unwed father had never been involved in the child's family life after birth. In *Lehr,* where the biological father waited until the child was two-years old and after a stepparent adoption petition had been filed, the court's concern was to determine whether the State had adequately protected his opportunity to form such a relationship. In upholding New York's notice requirements, the court stressed the father's inability to take the child into his own home was due solely to the custodial mother's activities *with no interference by the State.* (*Id.* at pp. 262-263.) Moreover, the stepparent adoption proceeding *Lehr* reviewed only maintained the custodial status quo in the mother and stepfather. However, *Lehr* suggests a natural father may lose constitutional protection for his parenting rights if he fails to grasp the opportunity when presented. (*Id.* at p. 262.)

In *In re Baby Girl M., supra,* 37 Cal.3d at pages 74-75, the majority opinion refers to an analysis of federal decisional law which concludes "the state may not deny biological parents the opportunity to establish a protected custodial relationship". (Buchanan, *The Constitutional Rights of Unwed Fathers Before and After, Lehr v. Robertson* (1984) 45 Ohio State L.J. 313, 351.) However, the court did not address this issue nor the significance of the fact that once her mother formally relinquished Katie to the County agency, it was solely the County's action and decisions which barred Edward from exercising parental control in the first instance and which permitted his child to become bonded to third parties so as to create the sole relevant factor we now use to justify terminating his par-

ental rights. It is this element alone which provides clear and convincing evidence that at this late date severing parental ties is in the child's best interest and satisfies the detriment finding.

Thus, Edward has been caught in the jaws of that trap recognized by the United States Supreme Court where the State has prevailed because of its "unusual ability to structure the evidence" and "power to shape the historical events that form the basis for termination." (*Santosky v. Kramer, supra,* 455 U.S. at p. 763, fn. 13.) From this snare, Edward, a willing, capable and loving parent has been unable to extricate himself in spite of prompt and persistent application to the courts.

I am not so certain, as the author of the lead opinion, that Edward's dilemma is sui generis, although this appears to be the only reported California or federal case with these precise facts. Four years before the section 7017 petition was filed in this case, we directed this same County agency to the following proposition:

> "'The importance of the adoption system in providing secure and loving home environments for children whose natural parents cannot or do not wish to raise them is obvious. However, in our rush to ensure the stability and efficiency of the adoption process, it is apparent that the rights of the parties involved—particularly the unwed father—may well suffer. It may be instructive in this regard to consider the growing awareness of adopted children who have undertaken to search for their "real" parents in an attempt to discover their familial roots. Would it not be fairer to all of the parties in an adoption proceeding to ensure that the rights of the putative father who wants to assume custody of his child and is adjudged qualified to do so are protected? After all, it makes no more sense

> to insist that all unwed fathers are disinterested and unfit parents than it does to continue in the belief that all mothers are by nature interested in raising children.
>
> 'It is to be hoped that courts will weigh these considerations in determining adoption issues!'" (*In re Tricia M.* (1977) 74 Cal.App.3d 125, 135, quoting 28 Hastings L.J. 221-222.)

Further, although the County assures us its policies now would lead it to handle a similar situation in a different manner, it continues to argue it was justified in denying Katie her opportunity to be legitimated and reared by her natural father and extended biological family.

While now conceding Edward had a constitutional right to develop an opportunity interest, the County claims its actions in 1981 were appropriate for two reasons. First, it argues its *parens patriae* role elevates its interest in determining suitable placement for a child over that of every natural father, even a capable, willing parent who has come forward before any meaningful third-party bonding is established and after the mother has legally abandoned her superior interest through relinquishment. (See *Adoption of Boy D.* (1984) 159 Cal.App.3d 8, 21.) The County cites no legal authority for this position and it defies reason and legal precedent that it can justify withholding custody from, let alone sever parental rights of, a natural parent of a month-old child who is in temporary placement merely because the other parent has relinquished the child to its control. Indeed, if mere relinquishment gave the State a paramount interest to a fit and proper natural father who has not forfeited the constitutional protection for his opportunity interest, there would be no reason to require the State to prove by clear and convincing evidence that it is

in the child's best interest not to be placed with a biological father. The County's *parens patriae* goal is to provide the child wtih a suitable permanent home. (*Santosky v. Kramer, supra,* 455 U.S. at p. 745.) The State registers no gain toward its declared goals when it separates children from the custody of fit parents. (*Id.* at p. 767, quoting *Stanley v. Illinois* (1972) 405 U.S. 645, 652.) Nor, I am certain, does it benefit society or the children the State is supposed to protect by denying a child the right to be legitimated by a loving, capable and willing biological father. The State's goal is only realized when the natural parent cannot or will not provide a normal family home.

Although here the County has the power to sever Edward's parental ties under the provisions of section 7017, it certainly cannot justify doing so to provide Katie with a fit home she would not otherwise have. While the County has a legitimate interest in severing parental ties when to do so is necessary to provide a child with family relationships not otherwise available, it has no legally recognizable interest in denying such a relationship to develop between the child and biological father under the facts of this case as they existed in 1981.

Certainly, section 7017 is a logical response to a very real problem in our society. When children are relinquished for adoption or because of parental unfitness are deemed permanently unlikely to be suitably reunited with parents, their very helplessness requires the State to act in their best interest. Obviously, in those situations, assimilating the children into stable family environments through the adoptive process is the most palatable solution. However, adoption with all its benefits is, at best, a prosthesis which should be used only when the biological

family cannot or should not be maintained. The prosthetic benefits of replacing a diseased or defective hip socket with steel or plastic is undeniable. To replace a perfectly healthy, well functioning socket with an equally useful prosthesis, however, is unjustified. The State's surgically-equivalent intervention here cannot be condoned.

The second justification raised by the County is that Edward failed to grasp his opportunity interest quickly enough. Yet the child was placed in its custody two weeks before Edward learned of her birth. He expressed his interest in custody only 17 days later, and one week before the County placed the child for permanent adoption.

The County's timeliness argument is predicated on several factors. First, that Edward forfeited his opportunity interest, because he did not maintain contact with the mother after their three-month relationship terminated to see if she might have been impregnated. Although the evidence shows that neither parent anticipated this result of their liaison, it is significant the mother desired to keep Edward unaware of her pregnancy and managed to do so, only alerting him more than a week after she had placed Katie with the County. In any event, Edward's knowledge of the pregnancy, even coupled with his possibly reestablishing a relationship with the mother *before* the birth, would not place him in a less vulnerable position here. One cannot become a "presumed" father short of marriage, a status the mother eschewed, or by the father taking the child into his family home *after* birth, an eventuality the mother forestalled for three weeks and the County has made impossible for six years. (§ 7004.) Because a natural father's opportunity interest is to allow him the

chance to establish a family relationship equivalent to that of a presumed father, short of marriage that can only be accomplished after the birth of a child.

A second justification put forward by the County is Edward's initial reluctance to ask for custody, suggesting instead the child be adopted or placed in a foster home with persons of his choice. Whatever his initial disposition, Edward's commitment to rearing his daughter was stated and has been firmly held from the time she was one-month old, before the child was removed from the County's adoptive pool and placed in a permanent setting and before bonding. Not only does the County fail to suggest any practical significance of the two-week delay in Edward's final decision, it does not even hint that an immediate request for custody would have altered its course. In light of the County's position in 1981, and now, contending its rights are paramount to those of any natural father, Edward's two-week delay cannot justify the County's position.

Discussing a fact situation similar to ours, Buchanan states:

> "Thus, the constitutional conclusion that a fit biological father . . . has a right to take on responsibility for his child *itself* prevents a state determination that children like [his] child are to be given into the care of those people whom the state considers best qualified." (*Buchanan, supra,* 45 Ohio State L.J. at p. 381.)

To the extent the State may have unconstitutionally deprived Edward of his opportunity to take responsibility for his child, he may have other remedies. (See *id.* at pp. 377-378, fn. 486.) However, the substantial degree of permanent emotional harm in removing Katie from her family of six years and preventing her legal legitimation within it is compelling on this record. Although I find the County's actions in barring Edward and his child from developing a normal biological family relationship legally unjustified, I reluctantly conclude time and circumstances require affirming the judgment dispensing with his consent for adoption.

CERTIFIED FOR PUBLICATION.

/s/ WORK, J.

I respectfully dissent.

In my view, under the facts, the law of the case (*In re Baby Girl M.* (1984) 37 Cal.3d 65), precedent and applicable constitutional principles forming the basis of the parental preference doctrine, a finding that an award of custody to the natural father would be detrimental to the child cannot properly be upheld where the father is found to be " 'a good parent [who] can provide a good, loving home for this child' " (*id.* at p. 68) and the detriment is based solely on evidence of harm to the child that would be caused by her removal from the only home she has ever known, the home of the prospective adoptive parents with whom the child was placed approximately five weeks after her birth. I would reverse with directions to the trial court to consider any evidence of additional circumstances bearing on the best interests of Katie and detriment in placing her with Edward that may have developed during the pendency of this appeal since February 1985 (see *In re Baby Girl M., supra,* 37 Cal.3d at pp. 75-76), and in the absence of substantial evidence of traits or circumstances personal to Edward that would support a conclusion of detriment, I would order the petition dismissed and custody awarded to Edward.

In re Baby Girl M. states in part:

> "The actions of *both* [italics in orig.] parents after the birth of their child determine their ability to accept parental responsibility. An unwed mother may have had no more desire to conceive or knowledge of the conception than the unwed father. Nevertheless she is given a choice to keep or relinquish the child because she gave birth. *Her decision to release the child for adoption should not deprive the father of a meaningful opportunity to retain and develop —his relationship* [italics added].
>
> "A natural father may not have *initial* custodial or veto rights equal to those of a presumed father. However, both classes of fathers share the same *burdens* of support for the child and liability for the reasonable expenses of the mother's pregnancy and confinement. (§§ 7010 and 7012.) Thus when the natural father's rights *do* arise, upon relinquishment by the mother, and he claims custody at a section 7017 hearing, an additional finding of detriment is neceessary to terminate his parental rights.
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> "V
>
> "We have held the trial court erred by applying the best-interests-of-the-child standard without first determining whether granting custody to the natural father would be detrimental. *A review of the evidence introduced at the hearing indicates a finding of detriment would have been unsupportable* [italics added] *at that time* [italics in orig.]. However, concerned, as we must be, with the child's welfare and because of the passage of time, we recognize further evidence will be necessary.[12]" (37 Cal.3d at pp. 75-76.)

Footnote 12 of the quoted passage provides: "We recognize the dilemma arising under the present fact situation. The state has placed the child with prospective adoptive parents pending resolution of Edward's claims; *strong relationships have developed, and breaking those bonds could be harmful to the child.*" (*Ibid.,* italics added.)

On this record there are no "actions" of Edward after the birth of Katie that are adversely determinative of his "ability to accept parental responsibility." (37 Cal.3d at p. 75.) The effect of an affirmance of the trial court's

judgment based on no acts of Edward himself is to allow the mother's decision releasing Katie for adoption to deprive Edward of a "meaningful opportunity to retain and develop his relationship." (*Ibid.*) This effect is contrary to the express language of *In re Baby Girl M.*

The parental preference doctrine is set forth by the United States Supreme Court and the California Supreme Court, respectively, as follows:

> "The rights to conceive and to raise one's children have been deemed 'essential,' [citation], 'basic civil rights of man,' [citation], and '[r]ights far more precious . . . than property rights' [citation]. 'It is cardinal with us that the custody, care and nurture of the child reside *first* in the parents . . . .'" (*Stanley v. Illinois* (1972) 405 U.S. 645, 651 [92 S.Ct. 1208, 1212], italics added.)

"[A] court *must* award physical custody of a minor to a parent, if fit to exercise custody, as against a stranger." (*In re B. G.* (1974) 11 Cal.3d 679, 693-694, fn. omitted, italics added.) This statement of the parental preferences rule was modified by the enactment of Civil Code[1] section 4600, part of the Family Law Act. The parental preference doctrine, *In re B. G.* points out:

> "embodied both a requirement that a custody order in favor of a nonparent rest upon a finding of parental unfitness, and the limitation that such an order would be made only in extreme cases. The enactment of section 4600 changes the former principle, and focuses attention not on the unfitness of the parent but the detriment to the child. [Citation.] The Legislature

[1]All statutory references are to the Civil Code unless otherwise specified.

> did not, however, intend to disturb the judicial practice of awarding custody to nonparents in preference to parents only in unusual and extreme cases. [Citation.]
>
> "As enacted, section 4600 expressly recognizes that custody should be awarded to parents in preference to nonparents. . . . [I]n a dispute between a parent and a nonparent, the section imposes the additional stipulation that an award to the nonparent requires a finding that 'an award of custody to a parent would be detrimental to the child.'" (*In re B. G., supra,* 11 Cal.3d 679, 698.[2])

[2]Before reaching this conclusion, *In re B. G.* noted the detriment standard reflects a concern the Legislature shared that without the standard a change in custody would be permitted "'merely because a subjective conclusion is reached that the child's interests will be better served somewhere else than with his parents and without any decision that the home of the parent would *not* be good for him.'" (11 Cal.3d at p. 697.)

In re B. G. also quoted at length from a report of the Assembly Judiciary Committee, stating reasons for the detriment standard as follows: "'Limitation of the power of the court to award custody of children to persons other than a parent is the primary intent of the provisions in the new act relating to child custody. Effort was made to avoid a *Painter* v. *Bannister* [258 Iowa 1390, 140 N.W.2d 152, cert. denied, 385 U.S. 949 (1966)] situation in California. In that case, an Iowa court awarded custody to Iowa grandparents of a young boy who had been temporarily living with them with the permission of his father after the accidental death of his mother. The court disapproved of the 'Bohemian' mode of living and intellectuality of the photographer father, a California resident, despite evidence that the father cared greatly for the child, was regularly employed and relatively successful, had remarried and would provide a stable environment. The court reasoned that Iowa farm life would be better for the interests of the child. . . .

"'[B]efore custody can be awarded to one other than a parent, the court must specifically find that an award of custody to a parent would be detrimental to the child, and that the award

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Since *In re B. G., supra,* 11 Cal.3d 679, it has been said:

> "The doctrine of parental preference in custody matters is an established right of constitutional magnitude. . . .
>
> " . . .
>
> "[A natural father's] rights to due process of law, as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution, mandate the application of the parental preference doctrine to the instant [§ 7017] proceeding. [Citations.]" (*Adoption of Baby Boy D.* (1984) 159 Cal.App.3d 8, 21-22.)

It was in furtherance of this parental preference doctrine that the California Supreme Court decided the law of this case, holding that in section 7017 termination of parentage proceedings it is error if the trial court finds it is in the best interests of the child to remain with the prospective adoptive parents without first finding that an award of custody to the natural parent would be detrimental to the child.[3] The California Supreme Court also pointed out that on the basis of the record before it, a finding of detriment would have been unsupportable at

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to a nonparent is required to serve the best interests of the child. What is "detrimental" had not been set forth with particularity. It is a nearly impossible task to devise detailed standards which will leave the courts sufficient flexibility to make the proper judgment in all circumstances . . . *The important point is that the intent of the Legislature is that the court consider parental custody to be highly preferable. Parental custody must be clearly detrimental to the child before custody can be awarded to a nonparent.'* (4 Assem. J. (1969 Reg. Sess.) pp. 8060-8061.) (Italics added.)" (11 Cal.3d at pp. 697-698.)

[3]Section 4600, including its requirement of a finding of detriment, no longer applies to section 7017 proceedings.

the time of the original hearing in December 1981. (*In re Baby Girl M., supra,* 37 Cal.3d at p. 75.)

In the context of the parental preference doctrine, I believe there still is not substantial evidence supporting a finding of detriment. There must be evidence of something wrong with the natural parent personally or with his or her circumstances that would detrimentally impact on the child before a finding of detriment can be supported. Here, of course, there is nothing wrong with Edward. The evidence is to the contrary and an affirmative finding of his good capability as a parent has been made. Thus, I believe the finding of detriment cannot be sustained.

Support for this conclusion is found in my analyses of the justices' opinions in the case *Michael U. v. Jamie B.* (1985) 39 Cal.3d 787, decided after the trial court ruled in the present case. *Michael U.* involved a section 7017 proceeding in which Michael, the father claiming custody, was 16 years old when the child, Eric, was conceived by Jamie, a 12-year-old who relinquished Eric for adoption. Eric was placed with prospective adoptive parents, the Whites. The essential finding of the trial court was that an award of custody to Michael would not be detrimental to Eric. Examining characteristics personal to the father that showed placing custody in him would be detrimental, a majority of the Supreme Court reversed for lack of substantial evidence to support the trial court's determination to the contrary.

There is no majority opinion in *Michael U.*, but four of the five justices concurring in the judgment as well as the two dissenting justices reveal in their opinions that an examination of the traits and circumstances of the natural

father is called for in order to have substantial evidence of the detriment element. The lead opinion, concurred in by one justice, focuses on facts showing the father's poor judgment and lack of maturity, including acts of juvenile delinquency, serious academic difficulties, disciplinary problems, youth, unemployed status, inexperience at "fathering" and plan to have the child cared for by the father's mother, a plan which might make necessary another change of custody. In its analysis of the evidence of detriment, the lead opinion briefly noted the suitability as parents of the prospective adoptive parents (39 Cal.3d at pp. 794-795) and it described the testimony of a child psychiatrist that removal from the home of the prospective adoptive parents would be detrimental, listing certain symptomology.

The lead opinion concludes its analysis:

> "If this case could be decided solely on the basis of the best interest of Eric, it would not be a close case. On this record we could not possibly justify taking Eric from the stable and loving home where he now lives. Michael, however, is entitled to the parental preference established by Civil Code section 4600, and to custody unless such an award would be detrimental to the child.
>
> "Even under this higher standard, however, we conclude that under the undisputed evidence we should reject the trial court's award of custody to Michael. Michael was an unemployed high school student whose social and sexual relationships and academic record demonstrate his lack of maturity and judgment. His ability to care for the child himself was open to question. We recognize that at the time of trial Michael was living with his family in an established and loving family relationship, but the award of custody is to

> Michael himself, and upon reaching majority he would be entitled to leave and take the child with him. Yet the act of changing custody would itself inflict serious harm on Eric, and if, as seems quite possible, Michael proves unable to care for Eric properly and further changes are required, that initial custody change would still have conferred on Michael a permanent right to veto any proposed adoption. We conclude that the implied finding that an award of custody to Michael would not be detrimental to Eric is not supported by substantial evidence, and that the court's order awarding Michael temporary custody of Eric was an abuse of discretion.[8]" (39 Cal.3d at pp. 795-796.)

In footnote 8, the lead opinion states:

> "We do not imply that Michael is 'unfit' in the sense that, if he received custody of Eric, the state would have grounds to intervene and remove the child. As the court explained in *In re Reyna, supra,* 55 Cal.App. 3d 288, 302, the concept of unfitness under Civil Code section 232 or Welfare and Institutions Code section 300 is distinct from the test of detriment under Civil Code section 4600. It is presumably detrimental to a child to award custody to a parent who is so unfit that the state might have to intervene to retrieve custody, but it might also be detrimental to place him with a parent who is not unfit, depending upon the child's current circumstances and the available placement alternatives. (*In re Reyna, supra,* 55 Cal.App.3d at pp. 302-303.)" (39 Cal.3d 796, fn. 8.)

Though believing that only a finding of best interests, not detriment, is necessary in section 7017 proceedings, one of the opinions concurring in the judgment, joined in by a second justice, states:

> "Interpreting the *Baby Girl M.* test, the same Court of Appeal justice who authorized that opinion for a

majority of this court concluded, in the Court of Appeal in this case, that it would *not* be detrimental to give custody of the infant to a 16-year-old biological father who was legally a rapist: as a juvenile delinquent who admittedly had sexual relations with a 12-year-old girl, the father could have been criminally prosecuted. (Pen. Code, § 261.5.) Apparently it now takes something more in a biological father than his attributes as an irresponsible and immature juvenile, a delinquent with no visible means of support and frequent criminal activity, to constitute circumstances detrimental to the well-being of an infant." (39 Cal. 3d at p. 797.)

Likewise, the two dissenting justices, viewing the record as containing substantial evidence supporting the implied finding an award of custody to Michael would not be detrimental to Eric, examine personal and circumstantial characteristics of Michael himself in reaching their conclusion. (39 Cal.3d at pp. 799-800.)

Inasmuch as six of the seven justices in *Michael U.* looked to features personal to the father in considering whether there is substantial evidence of detriment in the context of the parental preference doctrine, I believe evidence of that nature bearing on the issue is required before a finding of detriment can be sustained. No such evidence is present in this case. To the contrary, the father has been found to be a good parent who can provide a good, loving home for his child, and there is no evidence in the record of the 1985 hearing that would detract from or change this assessment of Edward's parenting ability. In

these circumstances a finding of detriment cannot be sustained.[4]

The question of the appropriate disposition of this case must be considered in the context of the parental preference doctrine. By August 10, 1987, the section 7017 proceeding will have been pending six years. Two evidentiary hearings and two appeals will have occurred in that time. The important human attachments and lack of attachments present in this case are inevitable incidents of this passage of time. During this time there has been no evidence of Edward's traits or circumstances that could be viewed as substantial evidence of any detriment to Katie in an award of her custody to him. The Department of Social Services has had ample opportunity to present any such evidence. Continued legal custody in the Department of Social Services (§ 224n, subd. (a)) no longer serves any constructive purpose. In my opinion, subject to a hearing limited to a consideration of evidence occurring after the February 1985 hearing that bears on the best interest and detriment issues, this is an exceptional case where there is no reason to prolong the proceeding by way of further hearings on the issues. (See

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[4]This conclusion should not be understood as expressing the view that the trial court was precluded from basing its decision in part upon evidence of detriment resulting from the breaking of bonds between the prospective adoptive parents and Katie. The Supreme Court, in the law of this case, invited the trial court to consider that sort of evidence of detriment. (*In re Baby Girl M., supra,* 37 Cal.3d 65, 76, & fn. 12—the court recognized "further evidence will be necessary" and in the footnote to this passage stated, in part, "breaking those bonds could be harmful to the child.") The evidence of detriment due to the separation of Katie from the prospective adoptive parents was properly considered by the trial court in this case.

In re B. G., supra, 11 Cal.3d 679, 699, "Only in an exceptional case, in which the record so strongly supported a party's claim to custody that a denial of that claim by the trial court would constitute an abuse of discretion may an appellate court itself decide who should be granted custody.")

In my view, subject to the limited hearing after remittitur, it is now time to award custody to Edward who is affirmatively shown by the evidence to be a capable parent, i.e., fit to exercise custody as against the prospective adoptive parents (*In re B. G., supra*, 11 Cal.3d 679, 693-694) and with respect to whom as a matter of constitutional law the custody, care and nurture of Katie first resides. (*Stanley v. Illinois, supra*, 405 U.S. 645, 651.) In this connection it is important to point out that at the February 1985 hearing, Edward recognized there would be some type of trauma to Katie in his taking custody but believed it could be minimized and made temporary. He proposed a gradual plan of reunification with involvement by the court, the prospective adoptive parents, the psychiatrist Dr. Nelson and the other children and adults in his life and the life of Katie. At oral argument on April 14, 1987, Edward reiterated his desire to engage in a gradual reunification plan. It is also worth noting that Katie is a normal, healthy, well-adjusted child. I would expect Edward to carry out a plan of gradual reunification along the lines outlined in the hearing so as to minimize the harshness on Katie as well as those around her from the award of custody to Edward.

CERTIFIED FOR PUBLICATION.

/s/ Lewis, J.

COURT OF APPEAL
FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

In re BABY GIRL M., a Minor	)	
	)	
COUNTY OF SAN DIEGO, etc.,	)	D003076
	)	
Petitioner and Respondent,	)	
	)	(Super Ct.
v.	)	No. A24905
	)	
EDWARD M.,	)	
	)	(Filed
Respondent and Appellant.	)	May 21, 1987)
	)	

ORDER MODIFYING OPINION

The lead opinion of Justice Wiener in this case, filed April 30, 1987, such that the sentence and citation which begins on page 7 and continues on page 8 should read:

> "Concededly, the record firmly supports the trial court's factual determination as to the existence of such harm,[2] hardly surprising in view of the consistent conclusions reached by child development and psychology professionals regarding the extent of personality and value structure development achieved by children during the first six years of life. (See generally, e.g., Developmental Psychology Today (1971) ch. 13, pp. 225, 236.)"

Footnote 2 remains unchanged,

/s/ Wiener
WIENER, Acting P.J.

In RE BABY GIRL M.
L.A. 31786

FILED
OCT 22 1984

We are asked to determine whether the trial court erred in terminating a natural father's parental rights by considering only the best interests of the child without first considering whether an award of custody to him would be detrimental to the child. We conclude Civil Code section 4600[1] is applicable to all section 7017, subdivision (d) termination proceedings and reverse the judgment.

I

Edward and Baby Girl M.'s mother dated during the fall of 1980. When the relationship ended in November, neither of them knew she was pregnant. Baby Girl M. was born on July 18, 1981. While in the hospital, the mother requested adoption assistance, met with a social worker, and placed the child in a foster home three days later. She had never informed Edward of the pregnancy and did not tell him of the birth until August 1, 1981.

Edward immediately contacted the San Diego Department of Social Welfare to determine his rights. He met with a social worker on August 5 and requested his daughter be placed with the family who was then providing day care for his sons. Later that day the mother formally relinquished the child for adoption and rejected Edward's placement request, stating she wished the child placed with a family neither of them knew.

On August 10 a section 7017 petition to terminate Edward's parental rights was filed. That same day Edward again met with the social worker, discovered the mother had relinquished the child for adoption, and expressed his fear he would be unable to see his child. He arranged to visit the child at the agency offices on August 17, at which time he specifically requested custody. Despite the father's wishes, Baby Girl M. was placed with the prospective adoptive parents on August 24.

At the section 7017 hearing in December, the court found Edward to be the biological father and "a good parent [who] can provide a good, loving home for this child." However, the court determined it was in the child's best interests to remain with the adoptive parents. Edward's parental rights were terminated without a finding it would be detrimental to the child to award him custody.

II

In 1976 the Uniform Parentage Act was enacted. (§§ 7000-7021.) One of its primary purposes, as well as that of several related statutes enacted simultaneously, was to eliminate the distinctions between legitimate and illegitimate children. To this end, the act declares the parent-child relationship extends to every child and every parent, regardless of the marital status of the parents (§ 7002), and sets forth various procedures by which the relationship of parent and child may be established. (§§ 7006, 7015.) In addition, it gives the natural father a right he did not previously possess: the right to notice of the hearing to terminate his parental rights. (§ 7017, subds. (b), (d), (f).)

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[1] All references are to the Civil Code unless otherwise indicated.

No adoption may be completed, even after a mother has relinquished the child, until a section 7017[2] petition is granted terminating the natural father's rights. Absent

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[2] Section 7017 provides in part:

"(a)(1) If a mother relinquishes for or consents to or proposes to relinquish for or consent to the adoption of a child who has (1) a presumed father under subdivision (a) of Section 7004 . . . the father shall be given notice of the adoption proceeding and have the rights provided under Chapter 2 (commencing with Section 221), Title 2, Part 3, Division 1 of the Civil Code, ... [¶] (b) If a mother relinquishes for, consents to, or proposes to relinquish for or consent to the adoption of a child who does not have (1) a presumed father under subdivision (a) of Section 7004 . . . the agency or person to whom the child has been or is to be relinquished, or the mother or the person having custody of the child, shall file a petition in the superior court to terminate the parental rights of the father, unless the father's relationship to the child has been previously terminated or determined not to exist by a court, or unless the father has been served as prescribed in subdivision (f) with a written notice alleging that he is or could be the natural father of the child to be adopted or placed for adoption and has failed to bring an action for the purpose of declaring the existence of the father and child relationship pursuant to subdivision (c) of Section 7006 within 30 days of service of such notice or the birth of the child, whichever is later . . . . [¶] (d) If, after the inquiry, the natural father is identified to the satisfaction of the court, or if more than one man is identified as a possible father, each shall be given notice of the proceeding in accordance with subdivision (f), . . . If any of them fails to appear or, if appearing, fails to claim custodial rights, his parental rights with reference to the child shall be terminated. If the natural father or a man representing himself to be the natural father, claims custodial rights, the court shall proceed to determine parentage and custodial rights in whatever order the court deems proper. If the court finds that the man representing himself to be the natural father is a presumed father under subdivision (a) of Section 7004, then the court shall issue an order providing that the father's consent shall be required for an adoption of the child. In all other cases, the court shall issue an order providing that only the mother's consent shall be required for the adoption of the child."

his prior written waiver, he is entitled to notice of the hearing. If he appears and "claims custodial rights, the court *shall* proceed to determine . . . custodial rights . . . ." (§ 7017, subd. (d), emphasis added.)

The Legislature, however, when it enacted sections 7000 et seq., did not specify the standard to be employed in a section 7017, subdivision (d) proceeding. Our analysis of statutory and decisional authority, recent legislative history, and public policy leads us to conclude the section 4600 detriment standard applies to a section 7017 custody hearing.

Section 4600[3] was enacted in 1969 as part of the Family Law Act. It sets forth a mandate that custody of a child in a dissolution proceeding could not be awarded to nonparents without both parents' consent or a finding "that an award of custody to a parent would be detrimental to the child. . . ."

In *In re B. G.* (1974) 11 Cal.3d 679, this court analyzed the legislative history of section 4600 and concluded "[a]s enacted, section 4600 expressly recognizes that custody should be awarded to parents in preference to nonparents. As between parents, it permits the court to award custody

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[3] Civil Code section 4600, subdivisions (a) and (c) provide in pertinent part "In any proceeding where there is at issue the custody of a minor child, the court may, ... make such order for the custody of the child during minority as may seem necessary or proper." [¶] *Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child. . . .*" (Emphasis added.)

'according to the best interests of the child,' but in a dispute between a parent and a nonparent, the section imposes the additional stipulation that an award to the nonparent requires a finding that 'an award of custody to a parent would be detrimental to the child.'" (*Id.*, at p. 698.) "There can be no question of the desirability of a uniform rule; the Legislature's specification that section 4600 applies to '*any proceeding where there is at issue the custody of a minor child*' demonstrates that section 4600 was enacted to fulfill that objective." (*Id.*, at p. 696, fns. omitted, emphasis added.)

The court in *In re Reyna* (1976) 55 Cal.App.3d 288, relying on *In re B. G.*, applied the section 4600 standard to facts similar to ours. An unwed father sought custody of his infant son after the mother relinquished the child for adoption. The court held "[b]ecause David asserts his entitlement to the physical custody of his child against the agency's claim to custody based on the mother's relinquishment, [section 4600] clearly applies." (*Id.*, at p. 296.)

The Second District Court of Appeal recently decided *In re Adoption of Baby Boy D.* (August 13, 1984) 2 Civ. B002775) — Cal.App.3d —. When a motion was made to terminate his parental rights, the unwed father sought custody. The court noted the issue was *custody*, not *adoption*. "So long as [the mother] does not assert her mother's right to physical custody, [the natural father] may not be denied custody of his child or have his parental rights terminated except upon finding that leaving custody with [the adoptive parents] is necessary to avert harm to the child." (*Id.*, at p. .)

The Legislature, when it enacted section 7017, was aware of this court's decision in *In re B. G.* extending the section 4600 standard to proceedings outside the Family Law Act. If the Legislature did not wish the detriment standard to apply to section 7017, subdivision (d) custody proceedings, it could have so indicated. (*In re William Phyle* (1947) 30 Cal.2d 838, *Estate of Carson* (1959) 174 Cal.App.2d 291, *Estate of Fritz* (1951) 102 Cal.App.2d 385.)

We are aware of the Legislature's enactment of Assembly Bill No. 649, vetoed by the Governor because he objected to certain financial provisions. Reintroduced as Assembly Bill 1782, and amended on January 17, 1984, the proposed statute again declared section 4600's parental preference would not apply to an alleged natural father seeking custody in a section 7017 hearing. However, this provision, as shown by a report on the bill to the Senate Committee on the Judiciary, was *never* considered by the Assembly Judiciary Committee, either as originally enacted or as reintroduced. The report stated: "AB 649 (McAlister) of 1983 contained a provision, identical to the one in AB 1782, applying the parental preference only to the presumed natural fathers. [¶] This provision was amended into both bills after they had left the Assembly Judiciary Committee. Thus it is once again being considered by only one policy committee. [¶] AB 649, which passed Senate Judiciary on a vote of 9-1, was heard when almost 80 other bills were on calendar." The report continues: "On November 18, the Select Committee on Children and Youth held an interim hearing on alleged and presumed fathers. This hearing was well attended by

representatives from the Department of Social Services, adoption agencies, the academic community, and those interested in fathers' rights. [¶] *The consensus of the witnesses was that the rights of alleged fathers are important and should be protected.* [¶] *This bill is contrary to that consensus.*" (Emphasis added.)

In a similar report on the bill, as amended February 23, 1984, the Senate Committee on the Judiciary confirmed the Legislature did not intend to deprive alleged natural fathers of the parental preference of Civil Code section 4600—"After lengthy debate the subject matter of this provision [denying alleged fathers section 4600 protection] was sent to interim, and the author agreed *to amend it out of the bill.*" (Emphasis added.) Thus the Legislature has declined its opportunity to disprove application of the section 4600 standard to section 7017 hearings.

Our interpretation is also consistent with the public policy which led to the Uniform Parentage Act and other relevant civil code sections. Sections 221-230 set forth the mechanisms for adoption. Section 232-240 contain the applicable law on freeing a minor from parental custody and control. Read together with the Uniform Parentage Act, the following statutory scheme emerges.

Under section 197, both mothers and presumed fathers[4] are *entitled* to custody of their minor children. An

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[4] Section 7004 provides in part: "(a) A man is presumed to be the natural father of a child if he meets the conditions as set forth in Section 621 of the Evidence Code or in any of the following subdivisions: [¶] (1) He and the child's natural mother are or have been married to each other and the child is born

(Continued on following page)

adoption can proceed *only* if their consent has been given or their parental rights have been terminated pursuant to a section 232 or section 224 hearing. The mother and presumed father are equally entitled to the child's custody; therefore his consent is necessary before the child may be adopted.

However, if the father is merely a natural father[5] and not a presumed father, the mother alone is entitled to the child's custody. *Only when the natural mother relinquishes the child for adoption* do the natural father's rights commence. (§ 7017, subd. (d).) He is to be notified and his custodial rights, if claimed, determined before the adoption can proceed.

(Continued from previous page)

during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court. [¶] (2) Before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and, [¶] (i) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce; or [¶] (ii) If the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation. [¶] (3) After the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and [¶] (i) With his consent, he is named as the child's father on the child's birth certificate, or [¶] (ii) He is obligated to support the child under a written voluntary promise or by court order. [¶] (4) He receives the child into his home and openly holds out the child as his natural child."

[5] A natural father is one who has been found to be the biological father but not a presumed father.

The Legislature intended to differentiate between the veto powers accorded unwed mothers and presumed fathers on the one hand and natural fathers on the other. Application of the detriment standard does not defeat this policy. We do not find *W.E.J. v. Superior Court* (1979) 100 Cal.App.3d 303 to the contrary. *W.E.J.* recognizes ". . . that, although the father was not a presumed father," he nevertheless was entitled to a hearing to determine his custodial rights. (*Id.*, at p. 311.) Confusion arose when the court seemed to reject a detriment standard by inferring its use would be tantamount to a veto. We agree the natural father, unlike the presumed father, holds no automatic veto power over the adoption. It does not follow, however, that the use of the detriment standard would lead to such a veto power and we disapprove any language in *W.E.J.* to the contrary.[6] In the context of section 7017, the mother must relinquish the child for adoption before the natural father has any rights. And once the child has been relinquished, we can foresee many instances where the trial court could find it was not only in the best interests of the child to terminate the father's parental rights, but it would be *detrimental* to the child

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[6] We note an additional problem with applying *W.E.J.* in the present context. The hearing below in *W.E.J.* was an *adoption* proceeding, not a section 7017 hearing. As a result, its author was concerned because there was "no finding that the *change of custody* [from the prospective adoptive parents] was in the child's best interest." (*Id.*, at pp. 306-307.) But the concerns voiced by the other justices illustrate there was no consensus on the appropriate standard to be applied. The dissent strongly supported application of the detriment standard enunciated in *In re B.G., supra*, 11 Cal.3d 679. The concurring opinion stated, "The trial court is directed (as it has not yet done) to consider, whether it *will be adverse to the best interests of the child* to give custody to the father." (*Id.*, at p. 315.)

not to do so. Then, as the natural and not the presumed father, his consent would be unnecessary and the adoption could proceed.

III

The major United States Supreme Court cases addressing cognizable interests of unwed fathers have involved situations where the fathers assumed full custodial responsibility or failed to pursue possibilities available to them. They either voluntarily ignored their rights or were precluded from ever exercising full custodial control because the mother had not relinquished the child. Both *Stanley v. Illinois* (1972) 405 U.S. 645[7] and *Caban v. Mohammed* (1979) 441 U.S. 380[8] involved biological fathers

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[7] In *Stanley*, the court concluded, "as a matter of due process," a father's parental rights could not be terminated without notice and "a hearing on his fitness as a parent . . . ." (*Id.*, at p. 649.) The *Stanley* court held unconstitutional a statutory scheme which irrebuttably presumed all unwed fathers unfit.

[8] The court in *Caban* found a statute allowing unwed mothers, but not unwed fathers, to prevent adoptions, to be unconstitutional. The court concluded "this undifferentiated distinction between unwed mothers and unwed fathers, applicable in all circumstances where adoption of a child of theirs is at issue, does not bear a substantial relationship to the State's asserted interests." (*Id.*, at p. 394.) The court found no "profound difference between the affection and concern of mothers and fathers for their children." (*Id.*, at p. 392.) and indicated "no showing" was made that allowing natural fathers *the right to consent* would "pose a strong impediment for adoption." (*Id.*, at p. 392.)

The *Caban* court, however, in two footnotes, specifically limited the application of its holding. In footnote 11, the court acknowledged the question of newborns was not at issue and reserved judgment. In footnote 16, the court stated: "Because we have ruled that the New York statute is unconstitutional under the Equal Protection Clause, we similarly express no view as to whether a State is constitutionally barred from ordering adoption in the absence of a determination that the parent whose rights are being terminated is unfit." (*Id.*, at p. 394.)

who had established strong ties with the children and held them out as their own. Both would qualify in California as presumed fathers, entitled to custody. Both had taken the affirmative steps necessary to assume parental responsibilities. By contrast, in *Quilloin v. Wolcott* (1978) 434 U.S. 245,[9] the father did not live with the child, offered only sporadic support, and made no attempt to legitimate the child until it was *11 years old*, when adoption was sought by the mother's husband. The court denied the legitimation petition by the natural father, who had declined to accept parental responsibility for 11 years and failed to avail himself of his statutory right to do so, on the ground of the best interests of the child. He had *not* requested custody. Under these circumstances, it is not difficult to assume the court could have also found it detrimental to the child to place her with the natural father. Additionally, in *Quilloin*, the mother *retained* custody and merely consented to her new husband's adoption request. Thus, no question arose of transferring custody from the only remaining parent.

Similarly, in *Lehr v. Robertson* (June 27, 1983) — U.S. —, 103 S.Ct. 2985,[10] the mother remarried and the

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[9] A "father's interest in the 'companionship, care, custody, and management' of his children is 'cognizable and substantial,' [citation] and . . . the State's interest in caring for the children is *'de minimis'* if the father is in fact a fit parent [citation]. *Stanley* left unresolved the degree of protection a State must afford to the rights of an unwed father . . . in which the countervailing interests are more substantial." (*Quilloin v. Walcott, supra*, 434 U.S. 246, 248).

[10] In *Lehr*, the court found constitutional a statutory scheme requiring an unwed father to file a notice with a registry claiming paternity of a child born out of wedlock if he was to be entitled to notice of adoption proceedings. But again the court did not rule on the issue with which we are presented.

new husband sought to adopt. The biological father was not given notice of the adoption proceedings because he had not strictly complied with New York law by filing a claim with the putative father registry. Again, a statutory method of establishing a parent-child relationship was available but he took no action to utilize it.

The Supreme Court has not directly considered a fact situation similar to ours, where a mother has relinquished a newborn child and refused the father any contact. Thus the court has not addressed whether the natural father's parental rights may be terminated by only a best interests standard, or if a further finding of detriment is required.

We recognize our state scheme satisfies the procedural requirements of notice and opportunity to be heard. Thus, our holding is not based on any *lack* of federal due process. However, it is appropriate to note a recent law review article exploring the constitutional rights of unwed fathers. "Recognition of an opportunity interest in unwed fathers requires a conclusion that if the two elements of a constitutionally protected parent-child relationship are the biological link and commitment to and exercise of custodial responsibility, the state may not deny biological parents the opportunity to establish a protected custodial relationship." (Buchanan, *The Constitutional Rights of Unwed Fathers Before and After Lehr v. Robertson* (1984) 45 Ohio State Law Journal 313, 351.) This "opportunity interest" may, however, be lost where a parent voluntarily fails to pursue custodial responsibility or "the child's stepfather voluntarily assumes full custodial re-

sponsibility for the child." (*Id.*, at p. 368.)[11] The fitness or detriment standard is met in the first instance by effective abandonment; in the second, the father will never have an opportunity to seek custody.

However, in the absence of these factors, and where an adoption is sought by "strangers, the father's opportunity to establish a protected relationship must prevail in the absence of his unfitness." (*Id.*, at p. 373.)

IV

We have held section 4600 applies to all parental custody proceedings involving a minor child. (*In re B. G.*, *supra*, 11 Cal.3d 679.) Whether it now applies in section 7017 hearings should not be controlled by the context in which insemination occurs. The actions of *both* parents after the birth of their child determine their ability to accept parental responsibility. An unwed mother may have had no more desire to conceive or knowledge of the conception than the unwed father. Nevertheless she is given a choice to keep or relinquish the child because she gave birth. Her decision to release the child for adoption

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[11] In *Adoption of Rebecca B.* (1977) 68 Cal.App.3d 193, 198, the court held only the mother's consent necessary for a stepparent adoption but found " . . . there inhere in the natural father certain residual rights in the child which cannot be terminated by adoption [citation] without notice and the opportunity to be heard. *Until the child is adopted, the natural father of an illegitimate child is a parent within the meaning of section 4600* (*In re Reyna, supra*, 55 Cal.App.3d at p. 297)." (*Id.*, at p. 199.) "[S]ubsequent relinquishment of the child to an adoption agency by the mother (§ 224m), [constitutes a change] of circumstance which could lead to the acquisition of custody by the natural father." (*Id.*, at p. 200.)

should not deprive the father of a meaningful opportunity to retain and develop his relationship.

At natural father may not have *initial* custodial or veto rights equal to those of a presumed father. However, both classes of fathers share the same *burdens* of support for the child and liability for the reasonable expenses of the mother's pregnancy and confinement. (§§ 7010 and 7012.) Thus when the natural father's rights *do* arise, upon relinquishment by the mother, and he claims custody at a section 7017 hearing, an additional finding of detriment is necessary to terminate his parental rights.

V

We have held the trial court erred by applying the best interests of the child standard without first determining whether granting custody to the natural father would be detrimental. A review of the evidence introduced at the hearing indicates a finding of detriment would have been unsupportable *at that time*. However, concerned, as we must be, with the child's welfare and because of the passage of time, we recognize further evidence will be necessary.[12] The circumstances leading to the earlier determination should be reviewed in light of subsequent events. "[W]e recognize that during the pendency of this appeal, additional circumstances bearing on the best interests of the child[ren] herein may have developed. Any such circumstances may, of course, be considered by the

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[12] We recognize the dilemma arising under the present fact situation. The state has placed the child with prospective adoptive parents pending resolution of Edward's claims, strong relationships have developed and breaking those bonds could be harmful to the child.

trial court on remand." (*In re Marriage of Carney* (1979) 24 Cal.3d 725, 741.)

We emphasize the section 7017 hearing is ancillary to the adoption, and while a condition precedent, it is not determinative. Adoptions can only be concluded after completion of the termination hearings and custody cannot, therefore, be determined by *comparing* the adoptive family and the father.

The judgment terminating the father's custodial rights is reversed. The matter is remanded to the trial court for further proceedings consistent with this opinion.

SONENSHINE, J.*

WE CONCUR:

BIRD, C.J.
BROUSSARD, J.
REYNOSO, J.
GRODIN, J.

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* Assigned by the Chairperson of the Judicial Council.

COPY

IN RE BABY GIRL M.
L.A. 31876

DISSENTING OPINION BY MOSK, J.

I dissent.

At the outset I note serious omissions in the facts related in the majority opinion. The opinion fails to mention that on August 5, when Edward first met with the social worker, he informed her that he was not interested in obtaining custody of the child because he was the divorced father of two small boys, and the child was a female. He suggested that she be adopted by a family whose acquaintance he had made at his church. Nor did Edward express any desire for custody on his second visit with the social worker on August 10. It was not until later that he made his first request for custody. By this time, the child's mother had signed the consent for adoption, and the section 7017 petition had been filed. The evidence is in conflict as to whether the child had been placed in the adoptive home before or after Edward purportedly changed his mind and sought custody for himself.

As I point out, infra, the Legislature intended to differentiate between the rights of presumed fathers and natural fathers in a section 7017 proceeding. The holding of the majority makes no such distinction. The result of their opinion is to grant to a biological father, who may have had a single night's liaison with a stranger, who may not have known about the child's birth until long after it occurred, and who may not have ever seen the child, the very same custodial rights in a section 7017 proceeding as are afforded to a father who was married to the mother for many years and lived with and supported his children

emotionally and financially over a long period. There is no persuasive reason why the best interest of the child should not be a sufficient standard to test the custodial rights of a man who has had no relationship of any nature with a child other than biological.

The practical result of the holding of the majority is that in the future an unwed mother who elects to place her child for adoption in a stable environment with a two-parent family will refuse to relinquish custody whenever, as is commonly the case, she does not desire custody to be placed with the man who became a father as the result of a casual liason and who has not formed any relationship with the child. In the present case, this scenario is more than theoretical. The mother signed the relinquishment only on condition that custody be transferred to the two-parent family chosen as adoptive parents. The social welfare department implied that it would permit her to withdraw her consent if this condition is not fulfilled.

Turning, then, to the legal flaw in the majority opinion I am of the view that their conclusion that a natural father's right to custody may be terminated only if the court finds such an award would be detrimental to the child can only be reached by disregarding the critical provisions of section 7017. This is precisely what the majority cavalierly do. They do not attempt to explain or to rebut the impact of the crucial provisions of the section. The opinion simply makes no reference to the provision of subdivision (d) of section 7017[1] that if the man is a presumed father, his consent to adopt is required,

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[1] The only reference to these provisions is in the statute quoted in a footnote.

whereas if he is not a presumed father "only the mother's consent shall be required for the adoption of the child."

The holding of the majority is inconsistent with the clear desire of the Legislature to differentiate between the rights of presumed and natural fathers in a section 7017 proceeding. They conclude that both presumed and natural fathers must be granted custody unless the court finds that such an award would be detrimental to the child. Why, then, did the Legislature direct the trial court must make a determination in that proceeding whether a man is a presumed or a natural father, and then provide that the question whether his consent to adoption is necessary shall be decided solely on the basis of the answer to this question?

The issues of whether a father must consent to an adoption and whether the detriment standard is employed in a section 7017 proceeding are inseparable. The legislative direction that the natural father's consent is not required is another way of declaring that the court need not make a finding of detriment in order to free the child for adoption. Otherwise, there would be no difference between the custodial rights of presumed and biological fathers in a section 7017 proceeding. That is, a presumed father's consent to adoption is required under subdivision (d) and, as everyone concedes, he may not be deprived of custody absent his consent unless the court finds that such an award would be detrimental to the child. But inexplicably the majority apply this standard to the biological father's rights.

In effect, the majority have given the biological father the right to veto an adoption, in contravention of the Legislature's express direction to the contrary. It is in-

escapable that the application of the detriment standard to a natural father gives him the identical veto powers over an adoption and the same custodial rights as are granted to a presumed father under section 7017.

The majority concede that the Legislature "intended to differentiate between the veto powers accorded unwed mothers and presumed fathers on the one hand and natural fathers on the other" (maj. opn., *ante*, at p. —*), but their attempt to explain why this intent is not being violated here is patently untenable.

First, they state that "the natural father, unlike the presumed father, holds no automatic veto power over the adoption" because if the trial court finds that it would be detrimental to the child to allow custody to the natural father, then "as the natural and not the presumed father, his consent would be unnecessary and the adoption could proceed." (Maj. opn., *ante*, at p. —.**) But if a finding of detriment were made, the presumed father would also be denied custody, and for that matter the mother of any other person who sought custody would also be rejected. The majority strike out on that point.

Second, the majority declare that there is a distinction between the custodial rights of presumed and natural fathers in that *before* the mother relinquishes the child for adoption she and the presumed father have equal custodial rights (Civ. Code, § 197), whereas the natural father's right to custody, if any, does not arise until after the relinquishment. However, we are concerned here only

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* Typed opinion at page 10.

** Typed opinion at page 11.

with a section 7017 proceeding, which by definition does not occur until after relinquishment by the mother. It is in such a proceeding the Legislature has directed that a presumed father must consent to adoption, whereas a natural father's consent is not required. The majority's reliance on distinctions between the rights of natural and presumed fathers in other contexts is, therefore, unavailing.

The legislative history of section 7017 strongly indicates that it was not the Legislature's intent to grant the identical custodial rights to biological and presumed fathers. An earlier version of the measure contained a provision that a natural father must be found unfit before a court could dispense with the requirement that he consent to an adoption. (Sen. Bill No. 347, as amended May 20, 1975, § 7023, subd. (d)). Later, the statute was amended to provide, as it does presently, that only the mother's consent is necessary for an adoption in the case of a father who is not classified as a presumed father. (Sen. Bill No. 347, as amended Aug. 12, 1975, § 7017, subd. (d).) While the circumstances under which the amendment was adopted are not clear, the elimination from the statute of the provision that a natural father must consent to an adoption unless he is found unfit demonstrates at the very least that at some point in the legislative process the right of a natural father to custody was considered and rejected.

Another indication of legislative intent appears from an analysis by the Assembly Judiciary Committee of Senate Bill No. 347, which contains the Uniform Parentage Act. This analysis, published in connection with the third reading of the measure, makes it clear beyond any doubt that the act does not grant any custodial rights to a natural

father or require his consent for adoption. The analysis states, inter alia, that the measure abrogates "any right to custody whatsoever" in the natural father.[2]

Finally, in September 1983, the Legislature passed a statute which expressly declared that the provisions of section 4600 "relating to parental preference shall not apply to an alleged natural father seeking custody in an action brought pursuant to . . . subdivision (d) of section 7017." (Assem. Bill No. 649 (1983 Reg. Sess.) § 6, subd. (h).) Although the Governor vetoed the measure because it contained certain financial provisions to which he objected, in his message to the Assembly the Governor

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[2]A comment printed with the proposed act states: "In 1972, in *Stanley v. Illinois*, 92 S.Ct. 1208, the Supreme Court gave natural fathers an undelineated, ill-defined right to the custody of their children. According to the Assembly Judiciary Committee analysis, 'No one can say with certainty the extent to which that right adheres, the circumstances under which the court can deprive a natural father of that right. In substance, at this point the court has asserted the existence of some right to custody in a natural father, but left the nature and extent of that right to conjecture. *This bill seeks to settle the issue by abrogating any right to custody whatsoever unless the father has adopted the child (and becomes a presumed father) by receiving the child into his home and holding the child out as his natural child. Unless the father is a presumed father, the mother alone can consent to the child's adoption. Furthermore, while an alleged father must be given notice of an adoption proceeding, and is given the right to come into court and seek custody, there are absolutely no standards under which, if met, the court would be required to grant him custody.* In fact, it is questionable whether the court has the authority to grant custody to the natural father. Any such authority must be implied from the fact that the father has the right to seek it. The bill does not contain a provision granting the court express authority to give custody to a non-presumed father. It is questionable whether in this respect the bill meets the constitutional standard of Stanley.'" (1975 Assem. File Analysis, microfiche ed., emphasis added.)

stated that he supported the substantive changes in the statute. (Governor's Press Release No. 504, Sept. 29, 1983.)

The majority's arguments based on legislative history following the veto of Assembly Bill No. 649 are less than convincing. It is incorrect to say, as do the majority, that because the author of a later bill decided to remove from the measure a provision that natural fathers would be granted section 4600 rights the "Senate Committee on the Judiciary *confirmed* the Legislature did not intend to deprive alleaged natural fathers of the parental preference of Civil Code section 4600." (Maj. opn., *ante*, at p. —,* emphasis added.) The *Legislature* (as opposed to a single member of a legislative committee) made its intention clear beyond any doubt when it enacted Assembly Bill No. 649 in 1983 providing that the section 4600 standard did not apply to section 7017 proceedings.

Nor am I persuaded by the majority's reliance on the fact that In re B.G. (1974) 11 Cal.3d 679, had been decided before the Uniform Parentage Act was adopted. From this, the majority draw the inference that the Legislature's failure to provide that the section 4600 standard did not apply raises an implication it intended to extend the parental preference doctrine to natural fathers.

Preliminarily, I note, that the majority also appear to rely on In re Reyna (1976) 55 Cal.App.3d 288 for the same point, but *Reyna* was decided after the Uniform Parentage Act was passed, and therefore it cannot support their contention. (See fn. 5, at p. 304.)

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* Typed opinion at page 8.

The facts and background of *In re B.G. are so* different from the present case that the implication the majority draw from its holding is untenable. That case involved the rights of a mother whose children had been removed from her custody without her consent—a situation dramatically different from that involved here. The decision was filed and section 4600 became law, before the advent of the Uniform Parentage Act, and at a time when a natural father had virtually no right in his children. Such a father lacked not only the benefit of the parental preference doctrine (Deering's Civ. Code (1971 ed.) §§ 200, 224; Guardianship of Truschke (1965) 237 Cal.App.2d 75, 80; Adoption of Irby (1964) 226 Cal.App.2d 238, 241; Adoption of Laws (1962) 201 Cal.App.2d 494, 500; Darwin v. Granger (1959) 174 Cal.App.2d 63, 70), but there was no statutory provision which entitled him to notice of a pending adoption proceeding, and he had no right to be heard in such a proceeding. If the Legislature had intended by the enactment of section 7017 to grant to natural fathers rights equal to those of a presumed father, a far more explicit reference would be required to justify such a radical departure from existing law.

More important, section 7017, subdivision (d), is inconsistent with section 4600, subdivision (c). While the former provides that the consent of the natural father to an adoption is not required, the latter states that a father's consent to the adoption is necessary unless the court makes a finding of detriment. As we point out above, if a biological father would be entitled to custody, absent a finding of detriment, his consent to the adoption would also be required. Thus, the Legislature, by providing in section 7017 that *only* the mother's consent is required if the child

has no presumed father, determined that the parental preference rule stated in subdivision (c) of section 4600 does not apply to natural fathers. Simply stated, application of the parental preference rule here would directly violate the Legislature's mandate that the natural father's consent to an adoption is not required.

This conclusion is further supported by the fact that at the same time the Legislature enacted section 7017 (Stats. 1975, ch. 1244, § 11), it amended the provisions of the Civil Code relating to adoptions to provide that the consent of the mother *and the presumed father* is required for an adoption (Stats. 1975, ch. 1244, § 7). The majority would by their *ipse dixit* amend this provision to include the natural father.

The majority strain mightily to support their untenable result by an erroneous evaluation of United States Supreme Court decisions relating to natural fathers. It is impossible to read the court's opinion in Lehr v. Robertson (1983) — U.S. —, and not recognize that due process requires nothing more than notification to the natural father that his rights may be terminated.

In *Lehr*, the natural father lived with the mother for two years, until the child's birth. He visited the mother and child in the hospital every day, but from the time of her discharge and for two years thereafter, the mother concealed the child's whereabouts from the father. During this period, the father never ceased his efforts to locate the child; he even hired a detective agency to find her. When he did find her, he visited the child as often as the mother would permit. He offered financial aid, and set up a trust fund for his daughter. The mother threatened the

father with arrest if he persisted in his attempt to see the child. The father retained counsel, who promised legal action if the mother refused to allow visitation rights.

The mother remarried, and her new husband filed a petition to adopt the child. The natural father also filed an action in another county to establish visitation and parental rights. Even though the court in the adoption proceeding was aware of the paternity action, it granted the adoption petition. The United States Supreme Court upheld the decision on the ground that the natural father had failed to comply with a New York procedure to register his name with a "putative father registry."

The high court's opinion is replete with references to the effect that a biological father need not be granted the same rights as a presumed father. It observed that the "mere existence of a biological link does not merit equivalent constitutional protection" as is afforded to a father who participates in the rearing of his child (— U.S. at p. —; [ ] and that since the lower court was not terminating a *developed* relationship the natural father's rights were adequately protected by the notification provided by the "putative father registry."[3] For obvious reasons the majority make no reference to these matters; they attempt to distinguish the decision on the

[3]The court characterized Stanley v. Illinois (1974) 405 U.S. 645, as holding that the "automatic destruction of the custodial relationship" rendered the statute there unconstitutional (103 S.Ct. at p. 2992), quoted from the opinion of the dissenting justices in Caban v. Mohammad (1979) 441 U.S. 380, which relied on the "clear distinction between a mere biological relationship and an actual relationship of parental responsibility", and distinguished these two cases from *Lehr* on the ground that they involved a "developed parent-child relationship" (*id.* at p. 2993).

ground that it did not involve a newborn child who was refused contact with the natural father is transparently fallacious.[4] The implication of the majority that a natural father cannot be deprived of custody unless he voluntarily declines the opportunity to establish a relationship with his child cannot be harmonized with the decision in *Lehr*.

Case authority is consistent with my conclusion. W.E.J. v. Superior Court (1979) 100 Cal.App.3d 303, recognizes that under the theory employed here by the majority the natural father would have a veto power over an adoption, contrary to the Legislature's intention. To the same effect is Adoption of Marie R. (1978) 79 Cal.App.3d 624.

A number of cases involving the rights of natural fathers were decided on the basis of the law predating the Uniform Parentage Act. Since the provision of section 7017 that a natural father's consent to an adoption is not required was not yet in effect, they have no relevance in the interpretation of section 7017. (In re Reyna, supra, 55 Cal.App.3d 288; Adoption of Rebecca B. (1977) 68 Cal.App.3d 193 [holding only that the natural father was entitled to notice and hearing of a pending adoption, and may be entitled to custodial rights if an adoption proceeding is abandoned].) In re Lisa R. (1975) 13 Cal.3d 636, involved an attempt by the natural father of a child with no living mother or presumed father to establish

[4]The majority also attempt to distinguish *Lehr* on the ground that the father there had not attempted to file notice with the putative father registry. Such registration would only have provided notice similar to that set forth in section 7017 and would not have granted any custodial rights to the natural father.

paternity; neither its holding nor its language is relevant to the present case.

Finally, even if the detriment standard is improperly applied in evaluating Edward's custodial rights, I would direct the trial court on remand to give substantial weight, in deciding whether it would be detrimental to award custody to Edward, to the circumstance that the child has been with the adoptive parents virtually all her life. Although the majority recognize the "dilemma" posed by the adoptive parents' custody (maj. opn., *ante,* at p. —, fn. 12*), they fail to give this emotional circumstance its appropriate effect.

A number of cases have recognized the trauma in removing a child from a settled home. In adoption proceedings this factor has been given determinative effect. (Adoption of Michelle T. (1975) 44 Cal.App.3d 699, 710; In re Volkland (1977) 74 Cal.App.3d 674; Williams v. Neumann (Ky. App. 1966) 405 S.W.2d 556, 679-680; In re Adoption of Tachick (Wis. 1973) 210 N.W.2d 865, 872-873.) *Michelle T.* quotes from the *Williams* case: " '[the petitioners have] attended every baby and childhood need and demand of [the child] from the fourth day of her life when she could neither focus her eyes nor raise her head. Up to this hour, according to this record, [she] has known no other mother as she has never seen her natural mother. She is now three and one-half years old and talking. She cannot be suddenly transplanted like a dogwood tree without running serious and dangerous risk of frustration

* Typed opinion at page 18, fn. 12.

and bewilderment.' " (44 Cal.App.3d at p. 707, italics omitted.)

In In re Reyna, supra, 55 Cal.App.3d 288, the court applied the detriment standard to the custodial rights of a natural father under procedures predating the Uniform Parentage Act. It recognized that on remand "if it is shown that it would be emotionally and psychologically harmful to uproot the child from the care and love of the nonparents with whom it has been living for a substantial period of time and place it with the father with whom it has never had contact, then custody must remain with the nonparents." (55 Cal.App.3d at p. 302.)

The majority, by not directing the trial court to give substantial weight to this factor, fail to take sufficient cognizance of the trauma of separation of this child from the secure home of the only parents she has ever known, to be placed in the custody of a man she does not know and who originally rejected her. This callous result follows because the majority err by applying an inappropriate legal standard. In so doing they will cause untold disruption of the normal adoption process and serious damage to the valid social and humanitarian purposes orderly adoption procedures heretofore provided.

I would affirm the judgment.

MOSK, J.

I CONCUR:

KAUS, J.

DONALD L. CLARK, County Counsel,
County of San Diego
Lloyd M. Harmon Jr., Chief Deputy

By JANET B. HOUTS, Deputy

355 County Administration Center, San Diego, Ca 92101
236-3550

Attorneys for Petitioner

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA

In And For The County Of San Diego

No. A 24905

In the Matter of the Petition to Terminate the Rights of the Alleged Natural Father, EDWARD McNAMARA, to BABY GIRL MILLER, a Minor	) JUDGMENT AND) ORDER) TERMINATING) RIGHTS OF A) FATHER)) (Filed) February 26, 1982)

The petition of the San Diego County Department of Social Services, a licensed adoption agency, for an order terminating the rights of Edward McNamara, alleged natural father, to the minor, Baby Girl Miller, pursuant to Civil Code Section 7017(b), came on regularly for trial on December 18, 1981, before the Honorable Judith McConnell, Judge presiding; the petitioner appearing by its counsel, Donald L. Clark, County Counsel, by Janet B. Houts, Deputy County Counsel; respondent Edward McNamara appearing personally and through counsel, Joseph D'Addario, Esq.; and James E. Bunker, Esq. appearing as amicus curiae; the court having read the official report

filed by the San Diego County Department of Social Services in this matter, the cause having been submitted to the court for decision, and the court having reviewed points and authorities submitted by both parties, and the court, being fully apprised in the premises, having filed a written Memorandum Decision granting said petition, WHEREFORE,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the rights of the alleged natural father, Edward McNamara, to the subject minor, BABY GIRL MILLER, are terminated.

DATED: FEB 26 1982

JUDITH McCONNELL
Judge of the Superior Court

In The

SUPREME COURT OF THE STATE OF CALIFORNIA

REMITTITUR

IN RE BABY GIRL M., a Minor.	)	
	)	
COUNTY OF SAN DIEGO, DEPARTMENT OF SOCIAL SERVICES,	)	L.A. No. 31786
	)	Appeal
Petitioner and Respondent,	)	County San Diego
vs.	)	Superior Court No. A 24905
EDWARD M.,	)	
Appellant.	)	

The above-entitled cause having been heretofore fully argued, and submitted,

IT IS ORDERED, ADJUDGED, AND DECREED *by the Court that the* judgment terminating the father's custodial rights is reversed. The matter is remanded to the trial court for further proceedings consistent with this opinion.

Appellant shall recover costs on appeal.

I, LAURENCE P. GILL, *Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the 22nd day of October, 1984.*

WITNESS *my hand and the seal of the Court, this 26th day of November, 1984.*

(SEAL)

LAURENCE P. GILL
Clerk
By /s/ D. McHENRY
Deputy

COURT OF APPEAL—STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

SAN DIEGO COUNTY DEPT. OF SOCIAL SERVICES, RESPONDENT,	)	No. D003076
vs.	)	SUPERIOR COURT NO. A24905
EDWARD MC NAMARA, APPELLANT,	)	(Filed May 18, 1987)
(IN RE BABY GIRL M., A MINOR	)	

THE COURT:

Because counsel for the parties have not sought rehearing, the petition for leave to file as an amicus is DENIED. The petition shall be lodged in the file for transmittal to the Supreme Court if review is granted.

By /s/ Wiener
Acting *Presiding Justice*

Copies to: James E. Sutherland, Esq.
Arlene Prater, County Counsel
Joseph D'Addario, Esq.
Lee Selvig, Esq.
County of San Diego Super Court

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL
4th District, Division 1, No. D003076
S001172

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

IN BANK

(Filed July 30, 1987)

In re BABY GIRL, M., a Minor

COUNTY OF SAN DIEGO, etc.,
Petitioner and Respondent,

v.

EDWARD M., Respondent and Appellant.

Appellant's petition for review DENIED.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above-entitled appeal filed April 30, 1987, which appears at 191 Cal.App.3d 786;mod. at 192 Cal.App.3d 90c). (Cal. Const., Art. VI, Section 14; Rule 976, Cal Rules of Court.)

By PANELLI
Acting Chief Justice

STATUTORY PROVISIONS

California Civil Code, section 4600, subdivision (b) (3) (c):

"Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a non-parent is required to serve the best interests of the child."

California Civil Code, section 7004, subdivision (a):

"A man is presumed to be the natural father of a child if he meets the conditions set forth in Section 621 of the Evidence Code or in any of the following subdivisions:

(1) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court.

(2) Before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and

(i) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after

its termination by death, annulment, declaration of invalidity, or divorce;

(ii) If the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation.

(3) After the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and

(i) With his consent, he is named as the child's father on the child's birth certificate, or

(ii) He is obligated to support the child under a written voluntary promise or by court order.

(4) He receives the child into his home and openly holds out the child as his natural child."

California Civil Code, section 7006, subdivision (c):

"An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under Section 7004 or whose presumed father is deceased may be brought by the child or personal representative of the child, the State Department of Social Services, the mother or the personal representative of the mother if the mother has died or is a minor, a man alleged or alleging to be the father, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor. Such action shall be consolidated with proceeding pursuant to subdivision (b) of Section 7017. The parental rights of the alleged

natural father shall be determined as set forth in subdivision (d) of Section 7017."

Former California Civil Code, section 7017, subdivision (d) (2):

"If . . . the natural father is identified to the satisfaction of the court . . . (he) shall be given notice of the proceeding in accordance with subdivision (f), unless he has been served with a written notice alleging that he is or could be the natural father of the child to be adopted, or placed or relinquished for adoption and has failed to bring an action pursuant to subdivision (c) of Section 7006 to declare the existence of the father and child relationship with 30 days of serving such notice or the birth of the child, whichever is later. . . . If the natural father or a man representing himself to be the natural father, claims custodial rights, the court shall proceed to determine parentage and custodial rights in whatever order the court deems proper. If the court finds the man representing himself to be the natural father is a presumed father under subdivision (a) of Section 7004, then the court shall issue an order providing that the father's consent shall be required for an adoption of the child. In all other cases, the court shall issue an order providing that only the mother's consent shall be required for the adoption of the child."